No. 15,052

United States Court of Appeals

For the Ninth Circuit

EMPIRE PRINTING COMPANY,
a corporation,
Appellant,

vs.

HENRY RODEN, et al.,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

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STATEMENT OF THE CASE.

This is a consolidation of three separate civil suits for libel commenced by Gruening, Roden and Metcalf and based on a publication of the Daily Alaska Empire on September 25, 1952.

As of that date the plaintiff Ernest Gruening was Governor of Alaska, the plaintiff Henry Roden was the elected Treasurer of Alaska (Tr. 407) and the plaintiff Frank Metcalf was the elected Highway Engineer of Alaska (Tr. 331).

The plaintiff Gruening, after completing college, entered newspaper work in Boston and in time served

as editor of the Boston Traveler, The Boston Journal, the New York Post, the New York Tribune and the New York Nation, had written and published a book on Mexico in 1928, acted as adviser to the U. S. Delegation at the Seventh Inter-American Conference (Pan American Conference) in 1933 after which service he was appointed Director of the Division of Territories and Island Possessions, Department of the Interior, in which capacity he served for five years before being appointed Governor of Alaska in December of 1939. Governor Gruening had been unanimously confirmed by the U. S. Senate for the position of Governor of Alaska three times and had held this position for approximately thirteen years when the September 25, 1952 edition of The Daily Alaska Empire was published (Tr. 143-145). As Governor of Alaska, Gruening was automatically a member of the Territorial Board of Road Commissioners, as well as of many other territorial boards (Tr. 146) and commissions.

The plaintiff, Frank A. Metcalf, after obtaining a master's degree in civil engineering, was engaged for a time as civil engineer in the State of Washington before coming to Alaska in 1910 where he established his own engineering service, practicing his profession throughout Alaska for thirty-seven years until appointed to fill an unexpired term as Territorial Highway Engineer in 1947, to which position he was elected in 1948. Metcalf had filed for re-election to the office of Highway Engineer after serving his first elective term and the election was to occur in October of 1952,

slightly less than two weeks after the September 25th issue of the Daily Alaska Empire was published. Metcalf had received over fifteen hundred more votes than his political opponent in the primary election in April of 1952, but was defeated by 621 votes in the general election of 1952, which election followed the above mentioned publication by a matter of less than two weeks (Tr. 330-333). At the time of the publication Metcalf was 73 years of age and had resided in Alaska 43 years (Tr. 359).

The plaintiff, Henry Roden, came to Alaska in 1897, engaged in prospecting and mining for five or six years while studying law, was admitted to the practice of law in 1906, served as Assistant U. S. Attorney in the Interior of Alaska, was elected to serve in the Senate of the First Territorial Legislature in 1912, continued to practice law in Fairbanks and along the Yukon River settlements until 1920 when he moved to Juneau, Alaska. He was re-elected to the Territorial Senate in 1935, 1937, 1939, and served as President of the Territorial Senate in 1941. He was elected Territorial Attorney General in 1941, and after serving the four year term returned to the private practice of law until appointed to serve the balance of the unexpired term of Territorial Treasurer Oscar Olson in 1950. Olson had been sent to prison for embezzlement of Territorial funds. In 1950 Roden ran without opposition in either party and was elected Territorial Treasurer. The plaintiff Roden was 78 years of age, had resided in Alaska 55 years and was serving as Territorial Treasurer when the September 25th, 1952

issue of the Daily Alaska Empire was published. As Treasurer he was automatically a member of the Territorial Board of Road Commissioners, which board was composed of the Governor, Highway Engineer, and Treasurer (Tr. 405-407).

One Oscar Olson was Treasurer of the Territory of Alaska until removed from office in May of 1949, later pleading guilty to two counts of embezzlement of public funds. The plaintiff Roden was appointed to serve the unexpired term as Treasurer of the Territory (Tr. 408). At the time of publication of the September 25th issue of The Daily Alaska Empire, Oscar Olson was confined in McNeil's Island Penitentiary serving the sentence imposed upon him for embezzlement of public funds.

The defendant, Empire Printing Company was an Alaska corporation and owner of The Daily Alaska Empire, the only daily newspaper published in Juneau, the capital of Alaska (Tr. 161). All of the outstanding stock in the Empire Printing Company with the exception of one share was owned by Helen Monsen, daughter of former Governor of Alaska, John Troy, and her sister, Dorothy Lingo (Tr. 557). H. L. Faulkner, attorney for appellant herein was the owner of one share of stock. Helen Monsen was President of the Empire Printing Company on September 25, 1952 (Tr. 554) and publisher and manager of its daily newspaper, The Daily Alaska Empire (Tr. 557, 571).

John Troy was replaced as Governor of the Territory of Alaska by the plaintiff, Ernest Gruening (Tr.

145). During the last years of the period of administration of John Troy he was personally assisted by Helen Monsen, his daughter (Tr. 536).

The editorial policy of The Daily Alaska Empire toward the plaintiff Ernest Gruening and his administration as Governor was not unfriendly until approximately 1941 (Tr. 561) when the policy changed to one of outright and gradually increasing hostility (Tr. 227, 194-195, 162).

The hostility of the newspaper toward the plaintiff Gruening and his administration was evidenced at first by the intentional omission of Gruening's name from all editorials and news dispatches (Tr. 188-189, 166-169) and by the practice of editing official statements submitted by Governor Gruening's office for the use of the press (Tr. 191).

The attitude of Helen Monsen, publisher of The Daily Alaska Empire toward the plaintiff Ernest Gruening and his administration was one of deep hatred, which almost bordered on psychosis. The attitude of James Beard, Managing Editor of The Daily Alaska Empire, toward the plaintiff Gruening and his administration was not as intense as that of Helen Monsen, but paralleled it in a modified way (Tr. 316-317).

For some time prior to the month of May, 1951, certain Territorial agencies dedicated to the task of attracting tourists and others to the Territory had advertised extensively in the United States to the effect that motorists could drive from the highways linking Alaska with the United States to Juneau,

Alaska, and there connect with steamers plying the Inside Passage back to the United States by ferrying their automobiles at nominal cost from the highway terminus at Haines, Alaska, to Juneau, Alaska, sixty-five miles, and via Alaska Steamship Company to Ketchikan, Alaska, thence back to the United States (Tr. 335). Prior to May of 1951 the ferry, "Chilkoot", plying between Haines and Juneau, had been under private ownership. In May of 1951 the private owner informed officials of the Territory that they could no longer operate at a profit because of the stringency and expense of complying with Coast Guard requirements and advised that they did not intend to operate the ferry which closed the sixty-five mile water gap between Juneau and the highways of Alaska and the United States during the 1951 season (Tr. 349).

Already faced with a large backlog of automobiles and freight waiting at Haines to be transported to Juneau, in reliance upon previous advertising, the Territorial Board of Road Commissioners met and voted to purchase the ferry "Chilkoot" from the private owners and operate it as a part of the Territorial Road System. Throughout the season of 1951 the ferry was operated under the direction of the Territorial Board of Road Commissioners and Highway Engineer Metcalf in particular. Operating expenses of the ferry were paid out of the Motor Fuels Tax Fund which was earmarked by the Legislature for roads, harbors, etc. Disbursements to cover operating expenses of the ferry in 1951 were made by voucher

approved by the Territorial Auditor and eventually paid by the Territorial Treasurer. Since the processing of a given voucher to payment required considerable time (several weeks on occasion), inconvenience and confusion resulted. The inconvenience and confusion was caused by the necessity of paying longshoremen at each terminus as soon as their work was completed, Federal law requiring payment of wages due crew members immediately upon their termination or discharge, and cash payment on C.O.D. freight carried by the ferry (Tr. 348). A further objection to the voucher system was that all receipts from the operation of the "Chilkoot" went to the Treasurer and into the General Fund of the territory, but all expenses of operation came out of the Motor Fuel Tax Fund, thus reducing the earmarked highway fund out of all proportion to the actual net cost of operating the ferry (Tr. 337, 345-346). Shortly prior to the commencement of the 1952 traffic season and on June 5th, 1952, the Territorial Board of Road Commissioners met to devise a procedure for handling the funds which would permit receipts from the operation of the ferry "Chilkoot" to be used to pay the expenses of the ferry thus avoiding the inconvenience, confusion and delay resulting from attempting to use the voucher system. It was imperative that many of the expenses connected with the ferrying of automobiles and freight between Juneau and Haines, Alaska, be paid immediately. Attempting to handle the above items by the voucher system was impracticable (Tr. 349). At the June 5th meeting of the Territorial Board of Road Commission-

ers, with all members of the Board and the Attorney General of the Territory present, the above mentioned problems were discussed and the minutes of the meeting show that the board unanimously approved the method of disbursement subsequently followed. This method consisted of establishing a bank account in the B. M. Behrends Bank of Juneau known as "Chilkoot Ferry", the only person authorized to draw checks on the said account being the purser, Robert E. Coughlin (Tr. 353). Coughlin reported weekly to the office of Highway Engineer Metcalf in connection with his operation. The Auditor of the Territory, one Neil Moore, was requested by Highway Engineer Metcalf to set up a bookkeeping system to handle the accounts and regularly audit the books in connection with the operation of the ferry, but refused (Tr. 354). After Auditor Moore's refusal Metcalf employed a certified public accountant in Juneau, one Chris Ehrendreich, to make a monthly audit of the accounts of the "Chilkoot" purser, Robert E. Coughlin. Ehrendreich made no complaints to Metcalf as to the method set up for handling the funds nor was any shortage ever mentioned to the plaintiff Metcalf. No shortage of funds ever occurred (Defendant's Exhibit C, Tr. 400) (Tr. 421, 422, 399, 400). The "Chilkoot" fund had been in existence and actually known to Auditor Moore for approximately three and one-half months before the publication complained of in this suit (Tr. 361). Although Moore was of the same political affiliation as the plaintiffs he admittedly had "no love" for the Gruening Administration (Tr. 284).

In their amended complaints, the plaintiffs alleged that prior to the September 25, 1952 issue of The Daily Alaska Empire this newspaper had conducted a campaign of misrepresentation, falsehood and calumny against the plaintiff Gruening intended to discredit and disgrace him and his administration of the affairs of the Territory of Alaska (Tr. 11-12).

In addition to deliberately deleting Governor Gruening's name from news dispatches and editorials and editing press releases from the Governor's office, evidence of the following Empire publications was introduced during the trial in support of the above allegation:

(a) The printing of a wholly false affidavit of a convicted felon which was intended to show that the plaintiff Gruening had attempted to influence the affiant's vote; that publication of said affidavit was made without asking Governor Gruening for his comments (Tr. 172-74).

(b) Of printing an editorial on May 25, 1951, entitled "Governor's Trip" discussing the visit of Governor Earl Warren of California to Alaska and his trip to Fairbanks, Alaska with Governor Gruening, inferring that Governor Warren was "Trapped" into making a speech in favor of statehood by Governor Gruening, an ardent supporter of statehood for Alaska, and concluding, "The rest of Alaska must surely be bowing low in humble apology today for the untoward action of its Governor" (Tr. 176, 577-578, 632).

(c) Of printing an editorial on April 15, 1952, entitled "R. E. (Anything for a Laugh) Sheldon", referring to the candidacy of Sheldon for the position of Territorial Auditor (against Neil Moore) as being an act "To help Gruening keep his gang together in spite of decent democrats" (Tr. 176, 580).

(d) Of printing an editorial on April 14, 1952, entitled, "The J-J Clambake" referring to a candidate as a "Gruening Creature" and to a talk by Governor Gruening in such words as "His Excellency, as he was affectionately addressed, brayed happily about the successes enjoyed by the Truman Administration ..." (Tr. 176-177).

(e) Of printing an editorial on September 13, 1951, entitled, "Another Stab in the Back", stating that Ananias was a piker (compared to Gruening) and referring to Gruening as "Alaska's Little Caesar" (Tr. 177).

(f) Of printing an editorial on March 15, 1952 referring to Governor Gruening as "Alibi Ernie".

(g) Of printing an editorial on July 9, 1952, entitled, "The Artful Dodger", stating in part, "Agile Ernie, the artful dodger, again managed to sidestep comments on the notorious Palmer Airport Deal", comparing the plaintiff Gruening with a notorious pickpocket of fiction (Tr. 585).

(h) Of printing an editorial on September 11th, 1952 (two weeks before the publication of September 25th) entitled "And Pays, and Pays and Pays", "Alaska's Footloose Governor, probably the most

traveled man ever to sign an expense voucher, will take off again this week for a junket across the Territory", plaintiffs' Exhibit 2 (Tr. 586-587).

These editorials were considered to be fair comment by the publisher and reflected the attitute of the Daily Alaska Empire toward Gruening's administration (Tr. 588).

The issue of the Daily Alaska Empire of September 25, 1952, devoted almost the entire front page to the so-called "Special Ferry Fund" hereinbefore described. A copy of the front page of this issue was introduced into evidence as plaintiffs' Exhibit 1, is available to the Court, but was not duplicated in layout in the transcript of record.

In this issue appeared a full length eight column headline across the top of the front page in large black type 1¼" high reading, "BARE 'SPECIAL' FERRY FUND".

Immediately below this headline and to the left appeared a sub-heading ⅝" high and five columns wide reading, "REEVE RAPS GRAFT, CORRUPTION". The sub-headline dealt entirely with a one column political item on the extreme left hand side of the page concerning a campaign speech of Robert Reeve, a candidate for election to the office of Delegate to Congress, and extended four columns to the right and immediately over a reproduction of a photostatic copy of a check drawn on the "Special Ferry Fund", the reproduction of the check being over a front page editorial two columns wide entitled, "START TALK-

ING BOYS", likewise dealing with the "Special Ferry Fund".

A sub-headline to the main headline, on the right hand side of the front page, three lines deep and in type ½" high stated, "GRUENING, METCALF, RODEN DIVERT 'CHILKOOT' CASH TO PRIVATE BANK ACCOUNT". Immediately below this sub-headline was another smaller sub-headline above the two column report on the fund and a picture of Neil Moore, who was credited in the news item following with having "uncovered" the existence of the fund.

Immediately to the left another full column was devoted to the fund under the headline "RODEN, METCALF SAY 'NOTHING CROOKED' HERE", with a picture of the plaintiff Metcalf.

The testimony at the trial was that the main headline was false in that the words "BARE" and "SPECIAL", used in connection with the fund, implied that information had been uncovered or discovered by the Auditor revealing a private and secret fund (containing public money) whereas, in fact, the existence of the fund had been known to the Auditor for over three months (Tr. 361); that the sub-headline "REEVE RAPS GRAFT, CORRUPTION" immediately over the reproduction of the photostatic copy of a ferry fund check inferred that the check had been discovered, was drawn on the secret private fund (containing public money) and was proof of graft and corruption (Tr. 156-157, 361-362, 410-411).

That the sub-headline, "GRUENING, METCALF, RODEN DIVERT 'CHILKOOT' CASH TO PRIVATE BANK ACCOUNT" was false in implying that the three plaintiffs had improperly and crookedly channeled public funds into their own private bank account or into a private account controlled by them (Tr. 158, 362, 412).

That the fourth paragraph of the lead story by Jack Daum stating, "The case closely parallels that of Oscar Olson, former territorial treasurer who is now serving a prison term at McNeil's Island Penitentiary for violating the law in the receipt and disbursement of public funds", was false in implying that the plaintiffs had stolen or embezzled public money, as had Oscar Olson, (Tr. 158, 414), and that in fact the establishment and administration of the fund did not in any way parallel the actions of Oscar Olson (Tr. 414).

That the last paragraph of the front page editorial entitled, "START TALKING BOYS" reading "Oscar Olson sits today in his prison cell, dreaming of the days when he thought Territorial laws were only for the underlings", was not only a false statement of fact as to why Oscar Olson was sent to prison but again imputed to plaintiffs the commission of the crime of theft or embezzlement (Tr. 159).

The witness Jack D. Daum, according to his own testimony, discontinued his attendance at the University of Alaska in 1949. Prior to 1949 he had had some experience on high school and college newspaper publications and later in the publication of certain

newspapers sponsored by his employers. After leaving college he worked for the Fairbanks Daily News-Miner as a reporter and then for the Washington D.C. Times Herald for approximately one year, coming to The Daily Alaska Empire on September 9 or 10, 1952, after approximately *two years' experience* on daily newspapers. He had been employed on The Daily Alaska Empire approximately *thirteen days* as a reporter when the issue of September 25, 1952 was published (Tr. 439-441). Although Helen Monsen was publisher and manager of the newspaper and one James Beard was managing editor, reporter Jack D. Daum personally and unassisted laid out and caused to be published the entire front page of The Daily Alaska Empire on September 25th, 1952 (Tr. 529). Daum wrote the lead article, the front page editorial (Start Talking Boys), and caused the reproduction of the photostatic copy of a check to be published (Tr. 442). No person checked on Daum's efforts or offered him assistance in connection with this issue (Tr. 470). According to Daum's testimony Helen Monsen was only a reporter on The Daily Alaska Empire and never told him what or what not to publish (Tr. 443), that Helen Monsen and James Beard did not know that he had prepared the September 25th issue as it was published, that reporter Monsen had requested that he publish one of her articles on the front page of that issue, but that he, Daum, told her that she could not do so as he had already laid out the front page for that day and would therefore have to publish her article on page three or page five (Tr. 529).

The witness Jack E. McFarland was Managing Editor of the Daily Alaska Empire until August 9, 1952, when he quit because of the unreasonable attitude of the publisher Helen Monsen toward Gruening and his administration and the distorted, unethical procedures of the Daily Alaska Empire with respect to news reporting (Tr. 324-325; Tr. 256).

According to the testimony of John E. Small, then a reporter on the Daily Alaska Empire, (Tr. 239) Jack D. Daum and the Managing Editor James Beard were discussing the page proof make-up of the September 25th issue in the editorial offices on the evening of September 24th when Beard stated (referring to the page proof and Governor Gruening) "We have the S-O-B where we want him", or words to that effect.

On November 14, 1955, and before the commencement of the trial a Motion to Amend the Amended Complaints of Roden and Metcalf to request judgment for $50,000.00 compensatory or general damages and $50,000.00 as punitive damages in each case was granted by the Court without objection from the defendant. By inadvertence, the complaint of Metcalf was not interlined to conform to the motion to amend and was printed in the transcript as it read before amendment. This error is explained by the certification of J. W. Leivers, Clerk of the Court, on file herein.

The cases were consolidated for trial and the jury returned verdicts on November 21, 1955, in favor of

each plaintiff in the sum of One Dollar ($1.00) as compensatory damages and Five Thousand Dollars ($5,000.00) as punitive damages.

ARGUMENT.

Appellant has divided its argument into eleven subject headings from page 29 through 71 of its brief.

Appellee has arranged its argument to follow appellant's arrangement and uses the same subject heading title and number.

I.

IT WAS ERROR TO RULE AND TO INSTRUCT THE JURY THAT THE PUBLISHED ARTICLES WERE LIBELOUS PER SE.

On page 29 of its brief appellant quotes the *second paragraph* of the Court's Instruction No. 3 to argue that the Court erred in failing to state in said paragraph that the publication must have falsely imputed the commission of a crime.

The *first paragraph* of Instruction No. 3 commencing on page 96 of the transcript reads as follows:

> "You are instructed that *any publication of false and unprivileged defamatory printing or writing* which tends to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence, or to disgrace him, or which tends to injure him in his reputation or business or occupation, when published of him maliciously, constitutes libel." (emphasis furnished).

The second paragraph of the same instruction commences as follows on page 97 of the transcript:

> "You are further instructed that *any such publication* which imputes to the person referred to the commission of a crime. . . ." (emphasis furnished).

It is quite obvious if the two paragraphs of the instruction are read in context, that the Court in using the words, *any such publication,* in paragraph two of the instruction, referred back to the wording contained in paragraph one of the instruction to-wit: *Any publication of false and unprivileged defamatory printing or writing.*

In the second paragraph of its brief on page 29 appellant states:

> "The Court does not say it is libelous per se to falsely impute the commission of a crime."

It is submitted that this is exactly what the Court did say.

Appellant also argues on page 31 of its brief that the Court erred in refusing to give defendant's proposed Instruction No. 6 the first sentence of which reads as follows:

> "You are instructed that there can be no dispute about the facts published with reference to a setting up of the Special Ferry Fund . . ."

While there may not have been serious dispute as to the facts there was a sharp difference of opinion as to whether the facts amounted to a violation of

the law, the great weight of the testimony however, being that there was no violation of the law.

The Attorney General of the Territory personally attended the meeting of the Board when the method of handling the fund was decided upon and acquiesced in the arrangement (Tr. 409).

The method of disbursement was proposed by the plaintiff, Roden, who was then Treasurer of the Territory and formerly Attorney General of the Territory (Tr. 409).

Roden's opinion of the legality of the fund is illustrated on page 413 of the transcript by the following answer:

> "A. The money was put in this fund for a public purpose. It was put into the fund as a legal proposition, a proposition supported by the Attorney General . . ."

Again commencing at the bottom of page 416 of the transcript the following testimony was given by Roden:

> "Q. Did the fact that, in what should have been a dignified editorial, the Empire referred to three of the highest officials of the Territory as 'Boys' strike you as a fair report or comment on the given situation?
>
> A. I would not think so.
>
> Q. In that editorial the statement is used that 'the money,' referring to the fund, 'which should have gone into the general fund.' Is that accurate, Mr. Roden?
>
> A. No.
>
> Q. Why?

A. The Attorney General was of the opinion that it was not necessary that it go into the general fund, and that was my opinion also.

Q. Your opinion was based upon a section of the Code dealing with the matter of monies received from licenses, taxes, fees, and other monies; was it not?

A. Other monies; yes; as it was fully explained in the communication by the Attorney General.

Q. In a rather lengthy opinion?

A. In a rather lengthy opinion given long before this transaction took place. I think that was given in December, 1951."

And then when cross-examined by counsel for defendant on this point Mr. Roden testified, as follows, commencing on page 422 of the transcript:

"Q. Now, how was this fund handled after Neil Moore went to the bank and told them to stop the payments out of the account?

A. The end of the season had come, and the Highway Engineer made another application to the Attorney General for his opinion, and the Attorney General repeated again that the special account was perfectly legal and could be paid out by the parties who put money into it. That was the opinion again of the Attorney General the second time.

Q. Now, let me ask you this. Isn't the Attorney General, you are talking of, Mr. Williams?

A. Yes.

Q. Didn't the Attorney General in October or September—I don't know the exact date but right after this publication—write an opinion in which

he said that the funds should be sent to the Treasurer and then sent to the Motor Fuel Tax Fund and paid out of there?

A. No, he didn't.

Q. He did not do that?

A. No.

Q. He didn't do that?

A. I know that opinion."

And again commencing on page 425 of the transcript with Mr. Roden being cross-examined by counsel for appellant the following transpired:

"A. Yes; the law sets up a method.

Q. And the law prescribes it should go into the Treasury, where there are Territorial funds?

A. Oh, no; not according to the opinion of the Attorney General, they shouldn't go in.

Q. Well, I know; but you are a lawyer yourself; and the Court is not bound by an opinion of the Attorney General. Doesn't the law prescribe the method by which public funds shall be handled?

A. Certain public funds, yes; but not all public funds.

Q. Well, but it says any public money or any money in which the Territory, or any funds in which the Territory or any county, municipality or subdivision has an interest?

A. No.

Q. Wouldn't that be public funds?

A. No. They need not go into the general fund, Mr. Faulkner. You are a lawyer also, and you know it.

Q. No; I didn't say the general fund. I mean to the Treasury.

A. No.

Q. It doesn't say that?

A. No. It happens every day.

Q. That it must be paid over to the Treasury?

A. Transactions that don't go through the Treasurer's Office happen every day pretty near.

Q. What is that?

A. Transactions where money is taken in by a public officer don't go through the Treasurer's Department at all.

Q. What is that?

A. What is that? Well, I will give you an example. For example, a delinquent father who has a child in a foster home, the Department of Welfare goes after him and says, 'Here, you have got to pay that foster home, say, fifty dollars a month.' Well, he hums and haws around for a while and he says, 'I will pay you that fifty dollars but I won't pay it to the foster home.' And the Welfare Department, they accept fifty dollars, and the Treasurer never knows it, and turns it over to the foster home. I will give you another illustration if you want me to. A man dies, and there is no money in his estate, and under the Social Security Law the Federal Government pays for the funeral. The Federal Government pays for the funeral to the parties who pay for it. The undertaker has no money to bury the man, and he says 'I must have money to buy the coffin.' All right; so the Welfare Department goes and says, 'All right. We will pay you; we will pay the man that paid for the funeral,' and then, when the money comes from the Federal Government, it doesn't go through the Treasurer's Office; it goes directly to the people to whom the Welfare Department advanced the money.

Q. Well, that is not hardly in the nature of public funds that——

A. It is in the same way it was with the ferry fund; it was not public money in the sense that it had to go through the Treasurer's Office.

Q. Of course this is more or less argument. What authority did the Board of Road Commissioners have in the first place to purchase the Chilkoot Ferry and to operate it?

Mr. Nesbett. Now, your Honor, I didn't go into that.

The Court. I had understood that there was no question about the authority of the Board to purchase this ferry."

The Court then carefully explains in Instruction No. 4 (Tr. 99) that the defendant's contention was that the violation of law referred to in the publications was only to the unlawful receipt and disbursement of public funds, which it claimed was true. In Instruction No. 5 the Court quotes Sec. 65-5-63 ACLA, which defendant claimed had been violated, and instructed the jury that it was for them to decide whether or not there had been a violation (Tr. 103-104).

Appellant then apparently argues commencing on page 32 of his brief that the published articles were susceptible of more than one meaning and that the Court failed to advise the jury properly with respect to the parallel to the Oscar Olson case which defendant pleaded as a defense and relied in particular on the words "in the manner of the receipt and disbursement of public funds". It is submitted that

this matter was covered thoroughly by the Court in its Instruction No. 5 (Tr. 104) and is covered in detail in the following subject heading.

II.

IT WAS ERROR FOR THE COURT TO RULE AND INSTRUCT THAT UNLESS IT WAS SHOWN THE APPELLEES ACTUALLY CONVERTED TERRITORIAL FUNDS TO THEIR OWN USE, THEY HAD COMMITTED NO CRIME AND NO OFFENSE INVOLVING CRIMINAL PUNISHMENT.

Actually the Court did not make a ruling or give an instruction as claimed by the above quoted heading of appellant to this portion of its argument.

In order to obtain a full perspective of the Court's instructions on the point it is necessary to review a portion of the instructions in context.

Instruction No. 4 (Tr. 98), states that the references in the publication to the Oscar Olson case clearly impute a crime and the jury is so instructed. They are further instructed that legally it is presumed that malice existed and injury resulted. The jury was further instructed that if they found the statements to be true or that they were published without malice or were privileged they must find for the defendant (Tr. 99).

Instruction No. 4 goes on to state that the Court does not declare or intend to indicate to the jury whether the crime imputed a theft or misappropriation of public funds. The jury was instructed that the defendant denied there was any accusation of theft of

public funds or that any such accusation was intended and contends that the violation of law charged in the publications referred only to the unlawful receipt and disbursement of public funds which the defendants alleged to be true. The jury was told that this was a question for them to determine from the publications and in determining this question they should consider the words used in the publications in their ordinary accepted meaning.

In Instruction No. 5 (Tr. 100) the jury was instructed that the defendant sought to justify the comparison to the Oscar Olson case by the provisions of Section 65-5-63 and the instruction quotes that section of Alaska law in its entirety, which section defines all aspects of the crime of embezzlement of public funds. The instruction goes on to point out to the jury that Oscar Olson was convicted under Section 7-1-9 ACLA 1949, which particularly defines the crime of embezzlement by the Territorial Treasurer, but provides that the penalty shall be the same as that assessed by Section 65-5-63. In other words the jury is fully informed of the fact that Oscar Olson was convicted of embezzlement under one statute and sentenced under the penalty provisions of another statute.

On page 102 of the transcript the jury is then instructed in part, as follows:

> "You are further instructed that *aside from the statutes above noted* (referring to Sections 7-1-9 and 65-5-63 ACLA) defining the crime of embezzlement of public funds, there is no statute in

> Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution." (Emphasis furnished.)

In the same instruction commencing at the bottom of page 103 of the transcript the Court further instructs the jury in part, as follows:

> "By this the Court does not intend to comment in any way as to whether or not the actions of the plaintiffs relating to the 'Chilkoot' ferry fund were or were not illegal, which is a matter for the jury, but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality."

Then on page 104 of the transcript the Court places before the jury squarely the question of whether or not the method of disbursement employed in administering the Ferry fund was a parallel case to that of Oscar Olson, in words as follows:

> "There remains to be considered by you the question of whether or not, as contended by the defendant, the 'device' used by the plaintiffs as members of the Board in depositing the funds from the operation of the ferry in a special account rather than paying such to the Territorial Treasurer, and in paying operating expenses of the ferry from such account, is a sufficient parallel with the case of Oscar Olson in setting up a special account as shown by the evidence to justify the publication as true. This is a question of fact for the jury to determine from a consideration of all of the evidence in the case."

On page 35 of its brief appellant quotes a part of Instruction No. 6 in italics for emphasis but fails to quote the last sentence. In order that it be considered in context with preceding and succeeding instructions the instruction in its entirety should be considered at this point in the argument:

No. 6

"You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show, to justify the truth of such publication, not only that the plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to divert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof."

At the bottom of page 35 and on page 36 of its brief appellant states that the Court erred in refusing to give defendant's proposed Instruction No. 7 and quotes Court's comment when it denied defendant's Instruction No. 7. It is submitted that the Court's offhand comment at the time Instruction No. 7 was

denied *does not amount to a holding nor does it amount to an instruction to the jury.* The statement was made out of the presence of the jury and the real test of the Court's holding will be found in reading the instructions as they were finally presented to the jurors. The foregoing outline of instructions given clearly outlines the Court's final thinking on these points and must be regarded to the complete exclusion of any offhand comment the Court may have made at the time a proposed instruction was denied.

In the middle of page 36 of its brief, appellant purportedly quotes the comment of the Court when it denied defendant's proposed Instruction No. 6. It is submitted that appellant has not correctly quoted the Court, in fact has misquoted the Court to the extent that the entire comment of the Court is perverted to suit appellant's argument. The correct comment of the Court near the bottom of page 665 of the transcript reads as follows:

> "However, the request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. *That,* again, is **not** for the Court to determine. There is dispute on the evidence. The defendant says they were. The plaintiffs, particularly Mr. Roden, say it was not. I am not going to decide that question. I leave it to the jury to decide." (Emphasis furnished.)

The Court plainly expressed and emphasized its intention (the exact opposite of that claimed by appellant) and carried out that intention with the proper instruction.

Oscar Olson, former Territorial Treasurer, was indicted and pleaded guilty to two counts charging him with embezzlement (Defendant's Exhibit J). Olson converted the money to his own use and was convicted under Section 7-1-9 ACLA 1949.

Paragraph IV of the lead article of the Empire on September 25, 1952, stated:

> "The case closely parallels that of Oscar Olson, former Territorial Treasurer who is now serving a prison term at McNeil's Island penitentiary for violating the law in the receipt and disbursement of public funds."

Olson did not violate the law in the "receipt" of public funds as Treasurer. His violation of the law with respect to the "disbursement" of public funds consisted of disbursing to himself and using the funds for his own purposes. This is commonly known as theft or stealing by the general public. The paragraph in its commonly understood meaning would be the equivalent of saying that the acts of the plaintiffs were very similar to those of Olson who was convicted of embezzling public funds and converting them to his own use and is now serving a prison term for that crime. The jury so found. The further implications of the publications are that the plaintiffs should and may very well be serving time themselves before the matter is ended.

Actually no factual proof was submitted at the trial which tended in any manner to prove that the cases were parallel, either in the method of receipt or disbursement. At least, the jury did not find a sufficient

parallel and the question was placed fairly before them.

The last paragraph of the front page editorial "START TALKING BOYS" stated:

> "Oscar Olson sits today in his prison cell dreaming of the days when he thought Territorial laws were only for the underlings".

The plaintiffs after being abused editorially in the preceding fifteen paragraphs are again compared to Olson the admitted thief, who "sits today in his prison cell dreaming, etc."

The above statements were, in part, the basis of plaintiff's complaints. The effect of Instruction No. 6 (Tr. 104-105) was to state that in order to prove the truth of these statements defendant must prove that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use, just as Olson had done.

The truth would have been a defense to the specific libel the jury found had been committed. The jury also found defendant had failed to prove the truth.

Defendant's proposed instruction No. 7 (Tr. 66), denied by the Court, would have instructed the jury that the comparison with the Olson case had been established at the trial as a fact, that the plaintiffs had committed embezzlement and the publication was not libel. As worded the instruction would have amounted to a directed verdict leaving nothing to the jury and was properly refused.

Defendant's proposed Instruction No. 6 (Tr. 65) would have instructed the jury that it was undisputed that accountants and auditors had found a shortage of $300.58 in the fund, that the accounts had been inaccurately kept and that it was impossible to ascertain from any source the exact status of the ferry fund. As a matter of fact defendant's own Exhibit C, Ehrendreich's audit, admitted over appellee's objection (Tr. 380) as a certified copy of a public record, prepared by a certified public accountant, stated as the concluding paragraph:

> "In my opinion, the purser has satisfactorily accounted for all Territorial funds coming into his custody between June 25, 1951 and September 30, 1952—voyages No. 1 to No. 54, inclusive. Respectfully submitted, C. J. Ehrendreich" (Tr. 400).

Appellant cites the case *Dimmick v. United States,* 9th CCA 121 Fed. 538, 1903 as authority. In that case the Clerk of the Mint received money for old materials sold on December 14, 1900. He falsely entered the receipts on the records as having been received on January 3, 1901. Defendant admitted he had used the money and knew of the regulation (Rev. St. 5492) which required that he deposit the fund in the same quarter as received. The finding of guilty of embezzlement in the trial Court was upheld on the basis that the offense was a *willful and felonious* failure to comply with the specified requirements of the Secretary of the Treasury.

Sec. 65-5-63 ACLA, upon which defendant relies so heavily reads:

"That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town or corporation has an interest, and shall in any way *convert to his own use any portion thereof or shall loan,* with or without interest, any portion thereof, or *shall neglect or refuse to pay over any portion thereof as by law directed and required,* or when lawfully demanded to do so, such person shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be."

The italicized portions indicate the separate acts, each of which could constitute a separate offense. Appellant does not contend that a conversion was proved; the loan aspect is covered elsewhere in this argument, but apparently believes that plaintiffs *neglected or refused* to pay over funds and states at the bottom of page 36 of its brief:

"Nothing could be plainer than the fact that this is a crime under the provisions of Section 65-5-63 ACLA 1949."

The only criticism of this argument is that the question was placed fully before the jury and it found that no such crime had been committed, or, if committed, was not a sufficient parallel with the Olson crime to constitute the defense of truth.

III.

THE COURT ERRED IN HOLDING AND INSTRUCTING THE JURY THAT UNDER THE STATUTES OF ALASKA THE APPELLEES WOULD NOT BE CRIMINALLY LIABLE FOR ILLEGAL ACTS OF THEIR AGENTS.

The appellant's title for this point plainly indicates that it believes the Court actually did instruct the jury that the plaintiffs would not be criminally liable for the illegal acts of their agents.

A careful search of the instructions given by the Court convinces the writer that *no such instruction was given by the Court.*

The Court, it is submitted, very properly denied defendant's proposed Instruction No. 27 which would have instructed the jury that it was admitted fact that the funds had been handled *as described in the publication.* The proposed instruction assumed to the jury that purser Coughlin was performing an illegal act in handling the funds and that Coughlin's illegal acts were those of plaintiffs. As submitted the instruction leaves nothing for the jury to find.

The Restatement of Agency, Vol. I, Sec. 19, does not read as cited by appellant on page 41, but rather provides, as follows:

> "The *appointment* of an agent to do an act is *illegal* if an agreement to do such an act or the doing of the act itself would be criminal, tortious, or otherwise opposed to public policy." (emphasis supplied).

Appellee has no argument with the authorities cited by appellant to the effect that in some instances a

principal may be held criminally for the act of an agent such as in the case of *U. S. v. Parfait Powder Puff Co.,* 163 F 2d 1008 where enforcement of the Pure Food and Drug Act was involved, nor with appellant's authorities to the effect that there might have been a sufficient "possession" or "control" of the funds in plaintiffs to satisfy that particular element of the crime of embezzlement.

But the Court clearly instructed the jury that defendant relied on having proved the truth of its libel by showing that plaintiffs had violated Section 65-5-63 "in the matter of receipt and disbursement of public funds" and left the question to the jury to determine whether plaintiffs had committed this statutory form of embezzlement and if so, whether it was a sufficient parallel to the Olson crime as to constitute the defense of truth.

Appellant ignores the fact that the crime imputed to the plaintiffs by the publication was that of embezzling public funds for their own use or gain, as had Oscar Olson. The commonly understood meaning of the publication was that plaintiffs had committed the crime themselves *and not through an agent.*

The balance of appellant's arguments under this point deal with the alleged loss of funds which appellees submit was immaterial to the trial of the case, but is covered elsewhere in this brief.

Appellant contends that this portion of his argument is sufficiently raised by specification of error Numbers 5 (Tr. 699) and 18. Appellees contend that

it is not. Rule 74(d) FRCP, Rule 18(2)(d) Rules of U. S. Court of Appeals for the Ninth Circuit.

IV.

THE COURT WAS WRONG IN STATING AND INSTRUCTING THE JURY THAT THE LAW PRESUMES THE PUBLICATION TO BE MALICIOUS.

The Court's action in refusing defendant's proposed Instruction No. 16, quoted in part, commencing on page 46 of appellant's brief, appears to be thoroughly correct. The instruction combines offerings regarding burden of proof (stated both positively and negatively) with respect to malice; preponderance of evidence; malice which avoids the privilege; a statement to the jury that plaintiffs had failed to allege in their complaints that defendant *did not believe the statements to be true;* presumption of good faith and negligence. The proposed instruction appears to have no logical beginning or coherent end to the extent that it could be used as a guide to the jury in applying the law to the facts in this case. All of these matters were coherently covered in various of the Court's instructions, where applicable.

On page 47 of its brief appellant states: "We have no law in Alaska covering civil actions for libel", apparently meaning statutes with respect to civil actions for libel, and implied malice in particular.

While there is no statutory law on that point, the case of *Vigni v. Lisianski Packing Co.,* 6 Alaska 182

(1919) plainly adopts and applies the principle of malice implied in law.

V.

IT WAS ERROR TO HOLD, RULE, AND INSTRUCT THE JURY THAT TRUTH IS NOT A DEFENSE UNLESS KNOWN AT THE TIME.

Appellant's title for this point is quoted above verbatim. Appellant clearly believes the Court instructed the jury that truth is not a defense unless known at the time of publication of the libel.

No such instruction was given by the Court (Tr. 91-117).

The writer has searched diligently and can find nothing in the records to substantiate appellant's claim that the Court *held* and *ruled* that truth is not a defense unless known at the time.

The exchange of remarks between the Court and counsel reported from the transcript of the record by appellant in its brief commencing at the bottom of page 51 was immediately preceded by the following (Tr. 607):

> "Mr. Faulkner. I will state—this case concerns the funds of the Chilkoot Ferry and the way they were handled. *The purpose of offering these checks is to show that, to show that Mr. Homer was the agent and that he collected revenue and transmitted that revenue to the Chilkoot Ferry, to Mr. Coughlin, as purser,* and to show the disposition of the checks. Now, I will state

to the Court, that is, the first list of checks I have here will show by their endorsement that they went into the special ferry account which is the subject of this suit (emphasis supplied).

The Court. Is there any dispute—

Mr. Faulkner. Just a minute, Your Honor . . ."

The stated purpose of offering the checks was to show that Mr. Homer (an employee of Coughlin) was agent to collect and transmit revenue to Coughlin, and that some checks so transmitted (conceivably) did not go into the ferry fund.

The Court's remarks at the bottom of page 607 and at the top of page 608 of the transcript were understandably those of query as to how counsel for defendant could possibly connect the acts of an agent up (assuming such was the relationship for the moment (Tr. 605)) with the plain imputation in the publication that the plaintiffs themselves had committed the same crime as Oscar Olson.

Appellant claims that error was committed in refusing to instruct the jury in part (page 50 of appellant's brief):

"It is also undisputed that the certified public accountants and auditors . . . found discrepancies . . . and a shortage of $300.58 . . ." when as a matter of fact the undisputed testimony was that there was not a shortage in the account. See defendant's own Exhibit C, last paragraph, admitted over appellee's objection (Tr. 400) which reads as follows:

"In my opinion, the Purser has satisfactorily accounted for all Territorial funds coming into his

custody between June 25, 1951, and Sept. 30, 1952 —Voyages # 1 to # 54, inclusive. Respectfully submitted, C. J. Ehrendreich."

See also the Arthur Anderson audit, Defendant's Exhibit E and the testimony of Henry Roden on page 419 of the transcript as follows:

"Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage."

and again on page 421 of the transcript as follows (Cross-examination of Roden by counsel for defendant):

"A. According to the last audit made on March 15, 1953, by the Arthur Anderson Company, I presume they had all the checks and all the records present. At that time they said it was three hundred and some cents short.

Q. Three hundred dollars?

A. I think it was three hundred dollars and some cents long.

That is the way that report reads, long not short."

Defendant's proposed Instruction No. 22 (page 51 Appellant's Brief) was properly denied. The first sentence reading:

"You are instructed that in all libel cases, the truth of facts published is a complete defense."

is a correct statement of the law and was thoroughly covered in the Court's instructions. The second sentence reading:

"Motive and purpose are immaterial."

is misleading as a complete statement of the law because motive and purpose *are material* unless the truth has been proved, and proof of the truth must amount to proof of "*The truth of whatever charges were made*". *Borg v. Boas,* 9th CCA, 231 Fed 2d 788, 792 Hn-1. In this case, proof that plaintiffs had committed the crime of embezzlement in the manner implied. The last sentence reading :

> "If the charges are true, it doesn't matter whether defendant knew at the time the facts were published they were true, but discovered that afterwards, for the truth whenever discovered is a complete defense."

had no place in the instructions. The plaintiffs never at any time claimed that the truth, to be a defense, must have been known to the defendant at the time of publication. Defendant had repeatedly conceded there was no personal conversion and was relying on having proved the truth, a violation of the law "in the matter of the receipt and disbursement of public funds." The remarks of the Court quoted by appellant were made out of the presence of the jury. The giving of this portion of the instruction could only have confused the jury.

It is submitted that the Court covered the matter of truth as a defense in its Instruction No. 4 commencing on page 98 of the transcript.

VI.

IT WAS ERROR TO SUBMIT TO THE JURY FOR ITS CONSIDERATION HEADLINE ENTITLED "REEVE RAPS GRAFT, CORRUPTION".

Concededly, if a reader took the time to read the news article to which the headline actually referred, it would become apparent that the headline had no connection with the ferry fund.

On the other hand, a reader's first perusal of the black print headlines in the natural sequence of reading plaintiff's Exhibit 1 (not printed but available to the Court) could very well create the following first and lasting impressions:

(a) A special secret ferry fund had been discovered. (Main headline)

(b) Gruening, Metcalf and Roden had been diverting the Chilkoot cash to their private accounts (right hand subheadline)

(c) Although the evidence is all against them, Roden and Metcalf deny anything "crooked" about the discovered fund and their diversions.

(d) One of the fund checks had somehow been obtained (and reproduced on the front page) and Auditor Moore had the "goods" on Gruening, Metcalf and Roden.

(e) Reeve is highly critical of such graft and corruption (Left hand subheadline over photostat of check).

Whether this would be the natural conclusion of the reader is, of course, for the jury to determine and

the Court very properly said in Instruction No. 4, in part, as follows (Tr. 99):

> "The Court does not here declare or intend to indicate to you whether or not the crime charged, imputed to the plaintiffs, the wrongful *theft or misappropriation* of public funds. The plaintiffs alleged that such words, together with other references to the Oscar Olson case, and imputations of graft and corruption, impute to them the crime of embezzlement as that crime is commonly understood, that is, the wrongful conversion of public funds entrusted to plaintiffs to their own use, which accusation is admittedly untrue. The defendant denies that there was any accusation of theft of public funds, or any such imputation intended, and contends that the violation of law charged referred only to unlawful receipt and disbursement of public funds, which it alleges to be true. This is a question of fact for the jury to determine, from a consideration of all of the evidence in the case, and *from a careful consideration of the publications in their entirety, including headlines, and any reasonable imputations or deductions arising therefrom.*"

Nothing in such an instruction would permit the jury "to wrench a word or phrase of an article out of context" and base a finding thereon, as argued by appellant.

VII.

IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY TO TAKE INTO CONSIDERATION THE LOSS OF THE CANCELLED CHECKS ON THE FERRY FUND.

The plaintiff, Ernest Gruening, went out of office as Governor of the Territory on the 10th day of April, 1953 (Tr. 145), the plaintiff, Henry Roden, went out of office as Territorial Treasurer on the 1st day of April, 1955, and the plaintiff, Metcalf, went out of office as Territorial Highway Engineer in April, 1953 (Tr. 332).

On the 18th day of October, 1955, the defendant served upon each of the plaintiffs a demand that they produce the cancelled checks involved in the administration of the so-called Ferry fund. This demand was served on the plaintiffs Gruening and Metcalf more than two years and six months after either of them had held Territorial office and might rightfully have had access to Territorial records. None of the plaintiffs was able to comply with the demand and the Court was so informed.

At the trial of the case counsel for the defendants insisted upon introducing in evidence Defendant's Exhibits F, G, H and I, all of which were certificates executed by the Territorial Treasurer, Territorial Highway Engineer and Territorial Director of Finance to the effect that none of the checks involved in the administration of the so-called Ferry fund was in their custody. All certificates were dated October 26, 1955, two years and six months after Gruening and Metcalf had held Territorial office and

six months after Roden went out of office. Counsel for defendants at the trial likewise insisted upon introducing the deposition of Minnie Coughlin which deposition merely stated that the deponent was unable to find any of the cancelled checks involved in the administration of the so-called Ferry fund.

The efforts of counsel for the defendant in making the above mentioned demands and introducing the exhibits at the trial appears to have been a studied attempt to create in the minds of the jury the thought that the plaintiffs were at the time of the demands responsible for the proper custody of the cancelled checks, were ordered to produce them and failed in their duty.

Defendant's proposed Instruction No. 18, cited verbatim on page 60 of appellant's brief, appears to bear out this analysis. The instruction was properly refused by the Court.

To instruct the jury that plaintiffs had not produced the records of the Ferry fund would inevitably have caused the jury to assume that plaintiffs had the obligation to produce them, even though they were kept in the custody of the proper territorial officials and in spite of the fact that none of the plaintiffs had held public office for a long period prior to the time the demands were made to produce. The demands were made less than one month before the trial date.

That sentence of the proposed instruction reading:

> "It was the duty of the plaintiffs to have seen that these checks, other instruments and bank statements were filed in the proper office and you

> are instructed that if any person having custody of any public records, books, paper or writing shall willfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949."

is ridiculous. The plain and obvious intent of the entire proposed instruction was to confuse the jury with a collateral issue, that of whether the plaintiffs and all of them had failed miserably in carrying out their duty to produce certain official records for which they were responsible and apparently had willfully destroyed, secreted or mutilated, thus committing still another crime under Territorial law.

VIII.

IT WAS ERROR TO HOLD THAT DEPOSIT OF MONEY IN A CHECKING ACCOUNT IN A BANK DOES NOT CONSTITUTE A LOAN.

Appellant's contention in connection with this point is that the plaintiffs were guilty of that portion of Section 65-5-63 ACLA 1949 providing that if any person shall receive any money belonging to the Territory and "shall loan, with or without interest, any portion thereof, . . ." he is guilty of embezzlement of public money and that in arranging for receipts from the operation of the ferry Chilkoot to be deposited in a bank account known as "Chilkoot Ferry Fund" the plaintiffs in effect loaned Territorial funds.

Appellant continually ignores the fact that Oscar Olson pleaded guilty to two counts charging him with converting Territorial funds to his own use in violation of Section 7-1-9 ACLA 1949 and that he was sentenced to serve ten years in prison for this violation under the penalty provisions of Section 65-5-63 ACLA 1949 *only*.

Oscar Olson was not charged with a crime for having loaned Territorial funds and the publications complained of mentioned nothing in connection with the loan of Territorial funds. The crime imputed to the plaintiffs was that of embezzlement and diverting to their own use.

In *United States Fidelity and Guaranty Company v. Carter* (Va. S. C. of Appeals, 1933), 170 SE 764, 90 ALR 191, the Court held that a State statute *declaring* it to be malfeasance for a Treasurer to lend public money was not violated in that case and said in headnote 7: "While there is no express statutory provision authorizing a county treasurer to deposit public funds in his hands in a bank to his credit as Treasurer, he commits no misdeed or malfeasance and is guilty of no wrong in so doing, provided he has acted in good faith and with due care. It is not only permissible for him to do so, but under modern business conditions he should do so."

It is conceded that the general legal effect of a deposit of funds in a bank is held to create the relationship of debtor and creditor between the bank and the depositor. The deposit in legal effect amounts to a loan to the bank. However, the Courts have con-

sistently held that the deposit of public funds in a bank by a public trustee is not a loan in the sense that the trustee is misusing funds belonging to the public. Appellant cites the case of *New York County Bank v. Massey,* 192 US 133, 135. This case merely decided that the deposit of a bankrupt made while insolvent was a loan to the bank and could be set off by the bank against debts owed the bank by bankrupt under Section 68(a) of the Bankruptcy Act permitting setoffs in cases of mutual debts. It has no application to the facts in this case even assuming that the question of whether plaintiffs had made a loan was relevant and could be proved as a violation of territorial law and therefore a defense to the libel.

Appellant cites *Bramwell v. USF&G* (CCA 9th, 1924), 299 Fed 705, which case merely held that a deposit of trust funds for Indians in an insolvent bank constituted a "debt due the United States" within the meaning of a Federal statute giving priority to debts due the United States in cases of insolvency and likewise has no application to this case.

It is submitted that the proper rule to be applied in the situation advanced by appellant, assuming that it was relevant to this case, would be that set out in the case of *Schumacher v. Eastern Bank & Trust Company* (CCA 4th, 1931), 52 Fed 2d 925. In that case the Court said on page 926 (second column):

> "Equity regards substance and not form, and is not bound by the names which parties may have given to their transaction. While the legal effect of a deposit is a loan to the bank, so that

the relations of debtor and creditor is created between the bank and the depositor (New York County National Bank v. Massey, 192 US 138, 24 S Ct 199, 48 L Ed 380), there is a distinction between a loan and a deposit as these words are used in common parlance: A loan is primarily for the benefit of the bank; a deposit is primarily for the benefit of the depositor. A loan is not subject to checks, a deposit ordinarily is. A loan usually arises from the necessities of the borrowing bank; a deposit, from the confidence of the depositor in its strength. A loan ordinarily is sought by the bank for its own purposes; a deposit is ordinarily made by the depositor for purposes of its own."

IX.

THE ADMISSION OF THE PURPORTED COPY OF THE FRED McGINNIS LETTER WAS PREJUDICIAL ERROR.

The letter referred to above read as follows (Tr. 186):

"Juneau Methodist Church
Fred McGinnis, Minister
Juneau, Alaska

November 7, 1952

Open Letter to Editor of Empire.
Editor, Daily Alaska Empire
Juneau, Alaska

Dear Sir:

In order to be candid and honest in reacting to your paper's policies with regard to your edi-

torials and other articles, I would like to express to you the following:

1. Your editorials generally are the poorest and worst written of any this citizen has ever seen in any newspaper anywhere, barring none.

2. Your editorials seem to be dedicated to causing the public to 'feel the worse' toward our Governor and a few other men. It seemed to me that you tried to cause the public to think of the Governor as a dishonest, mis-appropriating, unworthy man. You succeeded as far as I was concerned until other information threw different light on certain policies.

6. Your editorial of November 6th, in which you by implication invite the Governor to leave the Territory, was to my mind the lowest, cheapest and most unworthy type of editorial. * * *"

The letter was offered and admitted for the purpose of showing the reaction of the individual writer to the articles published by the Daily Alaska Empire (Tr. 186).

Counsel for appellant at the time admitted that the letter had already been published in the Daily Alaska Empire, together with a letter criticizing it and still another follow-up letter of criticism (Tr. 187).

All of the prejudice and harm that appellant argues resulted from the introduction of a portion of the letter would appear to be more than refuted by the acts of defendant in publishing the letter in its newspaper, along with letters to the contra opinion.

X.

THE METCALF CASE.

Appellant contends that error was committed in instructing the jury that if they found the facts warranted they could award exemplary or punitive damages to each of the plaintiffs (including Metcalf) even though Metcalf's complaint did not ask for punitive damages and submits that this point was raised by appellant's specifications of error Nos. 20 and 21.

Appellant admits in its brief that counsel for appellees asked leave of the Court at the beginning of the trial to amend the complaints of Roden and Metcalf to ask for punitive damages in both cases but claims that only Roden's complaint was so amended. Actually, both complaints were ordered amended by the Court and were so amended insofar as this appeal is concerned.

The certificate of J. W. Leivers, Clerk of the District Court, and the Reporter's Transcript of Ruling of the Court on Plaintiff's Motion to Amend, November 14, 1955, filed with Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit, on July 30, 1956, shows that a written motion to amend the complaints of Roden and Metcalf was filed on November 14, 1955, prior to trial, reading as follows:

> "The plaintiffs, Henry Roden and Frank A. Metcalf move to amend their complaints in causes No. 6725-A and 6727-A by substituting in the last sentence of Paragraph VIII the words 'Fifty Thousand ($50,000.00) Dollars' in lieu of the

words 'One Hundred Thousand ($100,000.00) Dollars' and by striking the prayers in said complaint and substituting therefor a prayer reading as follows: 'Wherefore, plaintiff prays judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000.00) as compensatory or general damages and the sum of Fifty Thousand Dollars ($50,000.00) Dollars as punitive or exemplary damages and for costs and a reasonable attorney's fee.''

That counsel for appellant stated that he had no objection to the granting of the motion and suggested that the amendment should be indicated on the pleadings by interlineation.

That the Court stated:

"Plaintiffs Roden and Metcalf were allowed to amend Paragraphs VIII of their complaint by interlineation."

That the Court files were on the Judge's desk at the time and that the Judge personally interlined the amendment on Roden's complaint but not on Metcalf's complaint.

That thereafter the Clerk of the Court inadvertently failed to interline the amendment on Metcalf's complaint with the result that it was printed in its original form in the transcript of record (Tr. 17).

Counsel for appellant made no objection to Instruction No. 9 (Tr. 109-110), could not possibly have been misled during the trial of the case to his client's prejudice because a copy of the written motion to amend had been served on him before trial and he

had stated that he had no objection, even suggesting that the amendment be made by interlineation. Appellant could have proceeded throughout the trial only on the assumption that the amendment to Metcalf's complaint had been made as directed by the Court. Nor was the point raised on motion for directed verdict (Tr. 55), objections to judgment (Tr. 121) or motion for new trial (Tr. 123).

Specifications of error Nos. 20 and 21 (Tr. 703) do not sufficiently make an issue of this point on appeal (Rule 74(d), FRCP).

XI.

FAIR COMMENT AND PRIVILEGED CRITICISM.

Appellant states on page 69 of its brief that "The Court refused to instruct that fair comment is not libel."

On page 673 of the transcript, and with respect to the Defendant's Proposed Instruction No. 23, the Court said:

> "No. 23, and again on the matter of fair comment, is substantially covered by the instructions, except for the last paragraph which is refused."

The last paragraph of Proposed Instruction No. 23 which was refused reads as follows (Tr. 86):

> "The statement in the article complained of that the plaintiffs' action in connection with the special ferry fund paralleled the Olson case in the receipt and disbursement of public funds *is a*

> *statement of fact. If you find this fact to be true,* and the other statements purporting to be facts to be true also, and the opinion or comment contained in the editorial to be fair comment and privileged criticism, your verdict must be for the defendant."

The italicized portion clearly indicates the reason for the Court's refusal.

Instruction No. 8 given by the Court was a thorough and completely fair coverage of fair comment and privilege (Tr. 106).

The case law cited by appellant on fair comment and privilege on pages 69-71 of its brief is good law and was fairly applied by the Court in this case in its Instruction No. 8 (Tr. 106).

Appellant should be well aware of the limits of the rule as outlined in the case of *Rustgard v. Troy,* 6 Alaska 338 (1921), an action against the father of the present owner of the Daily Alaska Empire wherein the Court quoted Newell on Slander and Libel with approval in part as follows:

> "For the same reason the publication of falsehood and calumny against public officers and candidates is an offense most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury."

This point does not appear to have been raised in appellant's specifications of error anyway.

CONCLUSION.

A completely fair and impartial trial was accorded defendant.

The defense that the publications were true and the facts and the law concerning the claimed "parallel" with Oscar Olson were fully presented to the jury.

The defense of fair comment was fully explained to the jury and unusually wide latitude was accorded defendant in the introduction of evidence.

The defense of privilege was even submitted to the jury although it would appear under the holding of this Court in *Swift & Co. v. Gray* (CCA 9th, 1939), 101 F 2d 976, that this would be solely a question of law for the judge to determine.

Of the three types of embezzlement mentioned in Section 65-5-63 ACLA, namely:

1. Conversion to own use
2. Loan
3. Neglect or refusal to pay over

defendant was given wide latitude to introduce evidence as to the latter two and the jury was thoroughly instructed. As to the crime of converting to own use, defendant never in its pleadings raised this issue and conceded repeatedly during the trial that it did not contend the plaintiffs had converted to their own use. Possible shortages in the Ferry fund were not mentioned in the publications and not raised as an issue in defendant's pleadings. The "substantial loss of public funds" mentioned in the second affirmative

defense was pleaded in connection with the purchase price paid by the Territory for the ferry and its net operating loss to substantiate the defense of public interest, duty (to publish facts), privilege and fair comment. In any event, defendant's own Exhibit C proves that there was no shortage in the fund.

Defendant was not prejudiced by not being permitted to introduce certain cancelled checks exchanged between Purser Coughlin and his agent Steve Homer. At best, these checks could only have confused the jury over entirely irrelevant transactions between "an agent of an agent" and could have shed no light whatsoever on whether or not plaintiffs had committed the crime of embezzlement in one of its forms.

These cases appear to the writer to be a sharply chiseled illustration of the very type of human abuse that the law of libel was intended to prevent.

Freedom of speech is a jealously guarded privilege in our law but when exercise of the privilege exceeds the bounds of social and moral decency the law justly provides for appropriate punishment.

Here, under the pretext of criticizing a method of handling receipts and disbursements, the acts of three of the highest Territorial officials, all of whom had long and honorable records of public service, were compared to those of an admitted thief in a front page spread that could hardly have been made more sensational in appearance if the United States had unexpectedly declared war.

It is respectfully urged that the judgments should be affirmed.

Dated, Anchorage, Alaska,
August 31, 1956.

Respectfully submitted,
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Attorney for Appellees.